

ARKANSAS COURT OF APPEALS

DIVISION
No. CACR08-881

BYRON CARLE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 29, 2009

APPEAL FROM THE GREENE
COUNTY CIRCUIT COURT,
[NO. CR-07-415(b)]

HONORABLE CHARLES DAVID
BURNETT, JUDGE

REVERSED AND REMANDED

WAYMOND M. BROWN, Judge

Appellant was convicted in a bench trial of theft of motor fuel. Appellant was fined \$250, ordered to pay \$200 court costs, and ordered to pay restitution in the amount of \$6.98. Appellant brings this pro se appeal arguing that he did not waive his right to a jury trial and that he did not possess the necessary intent to commit the crime of theft of property. We reverse and remand this case because appellant did not effectively waive his right to a jury trial.

A pretrial hearing was held on January 22, 2008, where the following exchange took place after appellant approached the bench:

THE COURT: Did you need something, Keith?

APPELLANT: Yes, sir. Your Honor, is there any way I could go back to the original schedule and set aside the continuance and go ahead and go to trial with the record as it is?

MS. DALE: I'd have to check with my witnesses to see if they can be ready.

APPELLANT: I have to get a car to come over here every time.

MS. DALE: He can stick around, and I'll see if my witnesses can be here.

THE COURT: Do you want a jury trial?

APPELLANT: I just want to get it over with.

THE COURT: If you are waiving a jury trial, I'll have to have that in writing.

APPELLANT: Who is the judge?

MS. DALE: I believe His Honor is.

THE COURT: I am. Does that scare you?

(Laughter)

APPELLANT: No sir. That's fine.

MS. DALE: Your Honor, the state may want a jury even if the defense waives it. If you can just stick around, and I'll see if my witnesses will be available.

APPELLANT: Might I ask how long that would be? I've got to pick my wife up from work. We only have one car right now. And I have a sick daughter at home. She had her tonsils out. It's just a bad time.

Can we do this by phone?

THE COURT: It's okay with me.

MS. DALE: That's fine. I can't be in two places at one time.

APPELLANT: I tried that once, and it didn't work.

THE COURT: Do it by phone. That's fine.

APPELLANT: I've got your number.

MS. DALE: Okay.

Appellant's bench trial took place on February 5, 2008. The State called Wendy Parnell as a witness. Parnell testified that she was the manager at the Dodge Store in Paragould on June 13, 2007. According to Parnell, appellant came to the store, in a U-Haul, on that date and prepaid for six dollars worth of gas on pump eleven. Appellant realized that he did not want the higher grade of gas and came back into the store to get his prepayment switched to another pump. Parnell stated that appellant went outside and "pumped the gas before it was set." Parnell said that appellant came back into the store after he pumped more gas than what he asked for and refused to pay the additional amount. Parnell testified that she informed appellant that he had to pay for whatever amount of gas he put into the tank. She stated that appellant was adamant about refusing to pay for the gas. Parnell said that appellant had enough money to pay for the additional gas because he prepaid with a twenty dollar bill and received fourteen dollars back. Appellant told Parnell that he was not going to pay for the gas and that he was going across the street to return the U-Haul. Parnell told appellant that if he did not pay for the gas, she was going to call the police. Appellant told Parnell fine and stated that he would be across the street.

On cross, Parnell stated that the pump is preset and will automatically shut off when a person prepays for gas. She stated that if appellant had used pump eleven, it would have automatically shut off. Parnell testified that the cashier had to turn on the other pump for appellant and that she could have preset that pump to six dollars; however, Parnell stated that she did not know whether the cashier indicated to appellant that the pump was not preset and

that he would have to stop it. Parnell said that she learned of the excess fuel being pumped into the U-Haul when appellant came back into the store. She further stated, "I don't feel like the machine overpumped. [Appellant] pumped the fuel."

On re-direct, Parnell stated that a person is responsible for paying for the fuel that he pumps. She also said that had appellant stood in line and waited his turn, the transaction of switching pumps would have been easier. On re-cross, Parnell stated that she did not believe that appellant intended to get the extra fuel.

Appellant testified that he needed about two gallons of gas to replace the fuel in the U-Haul. Appellant stated that he prepaid for six dollars worth of gas and went outside. He said that once he realized he had prepaid for the more expensive fuel, he went back inside and asked the cashier to switch the pumps. Appellant testified that the cashier consented to switching the pumps and he went back outside. Appellant stated that he set the pump to pump automatically and began to gather his belongings so that he could return the U-Haul. He said, "I realized almost instantly the pump had not stopped. I jumped out and stopped the pump on \$12.98, \$6.98 more than I had asked for." Appellant testified that he went back into the store and told the cashier what happened. According to appellant, the cashier apologized because she forgot to preset the pump. Appellant stated that he informed the cashier that he did not want the gas but the cashier told him that there was nothing she could do. The cashier called Parnell to the register and appellant also informed her that he did not want the gas. Appellant stated that Parnell told him that he had to pay for the gas and that he refused. Appellant testified that he told Parnell that he was not going to pay for their

mistake and that if they wanted to be paid for the extra fuel, they would have to get the money from U-Haul across the street. Appellant stated that Parnell told him that if he left without paying for the gas, she would call the police. Appellant told Parnell to go ahead and that he would be across the street at U-Haul. Appellant testified that the police arrived a few minutes later and he was arrested.

On cross, appellant stated that he had the money to pay for the gas. Appellant also said, "I left after she asked me to pay knowing I was taking something they were claiming I did not pay for. I understand their frustration, but it was their fault, not mine." Appellant testified that he did not necessarily have to watch the pump because he had prepaid and the pump should have stopped on six dollars.

Appellant made motions at the conclusion of the State's case and at the conclusion of all of the evidence arguing that the State failed to show that he had the requisite intent to get the extra fuel. The motions were denied and appellant was found guilty of theft of fuel. He was ordered to pay fines, court costs, and restitution. The judgment and commitment order was filed on February 5, 2008. Appellant filed a motion to vacate the judgment and for a finding of not guilty as a matter of law on March 4, 2008. Appellant's notice of appeal was filed on May 2, 2008.

Appellant argues that the trial court erred when it denied his directed verdict motions because he lacked the requisite intent to sustain his conviction. Because this was a bench trial appellant's motion for directed verdict was in reality a motion to dismiss. *Stewart v. State*, 362 Ark. 400, 208 S.W.3d 768 (2005). A motion to dismiss at a bench trial and a motion for a

directed verdict at a jury trial are challenges to the sufficiency of the evidence. Ark. R. Crim. P. 33.1. Double-jeopardy considerations require this court to review sufficiency arguments before other points are addressed. *See Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Appellant was found guilty of theft of motor fuel. Ark. Code Ann. § 5-36-120 (Repl. 2006) states in pertinent part:

(a) A person commits the offense of theft of motor fuel if the person knowingly operates an automobile or other related vehicle after placing motor fuel in the automobile or other related vehicle at a:

(1) Service station, filling station, garage, or other business where motor fuel is offered for sale at retail, so as to cause the automobile or other related vehicle to leave the premises of the service station, filling station, gasoline station, garage, or any other business where motor fuel is offered for sale at retail, with the intent of depriving the owner of the motor fuel and not making payment for the motor fuel [.]

Appellant questions the meaning of the phrase “after placing” in the above statute. According to appellant, the extra fuel was dispensed due to the cashier’s failure to preset the pump, not his intention to obtain fuel without paying for it. We review issues of statutory interpretation de novo, because it is for this court to determine the meaning of a statute. *See*,

e.g., *Great Lakes Chem. Corp. v. Bruner*, 368 Ark. 74, 243 S.W.3d 285 (2006). Regarding our standard of review for statutory construction, our supreme court has said:

The basic rule of statutory construction is to give effect to the intent of the legislature. Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe the statute so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible.

Id. at 82, 243 S.W.3d at 291 (citations omitted).

The language in Ark. Code Ann. § 5-36-120 is unambiguous. Therefore, we construe the statute just as it reads. *Great Lakes Chem. Corp.*, *supra*. Appellant argues that the pump was supposed to be preset; that he set the pump to automatically dispense; and that he had no control over the dispense of the extra fuel. This argument is not convincing. The trial court told appellant “you did initiate the pump.” We agree. In any case, appellant was responsible for the amount of fuel dispensed once he initiated that pump. The phrase “after placing” covers appellant’s actions of prepaying and setting the pump to automatically dispense the fuel.

Appellant further argues that he did not have the requisite intent to sustain his conviction. A criminal defendant’s intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *DeShazer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006). Because intent cannot be proven by direct evidence, the fact finder is allowed to draw upon common knowledge and experience to infer it from the circumstances. *Id.* Due to the difficulty in ascertaining a defendant’s intent or state

of mind, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.*

Appellant testified that he refused to pay for the additional fuel even though he had the money. Appellant left the Dodge Store knowing that he had not paid for the additional fuel in the U-Haul and that the police would be called. We hold that appellant possessed the necessary intent for purposes of § 5-36-120 . Therefore, the evidence was sufficient to sustain appellant's conviction.

Our inquiry does not end with appellant's sufficiency challenge. Appellant also argues that he did not effectively waive his right to a jury trial. A criminal defendant may waive his right to a jury trial if there is compliance with Ark. R. Crim. P. 31.2, which provides:

Should a defendant desire to waive his right to trial by jury, he may do so either (1) personally in writing or in open court, or (2) through counsel if the waiver is made in open court and in the presence of the defendant. A verbatim record of any proceedings at which a defendant waives his right to a trial by jury in person or through counsel shall be made and preserved.

The record or evidence must demonstrate that a defendant knowingly, intelligently, and voluntarily waived his right to a jury trial and anything less is not a waiver. *Maxwell v. State*, 73 Ark. App. 45, 41 S.W.3d 402 (2001). Whether there was an intelligent, competent, and self-protecting waiver of a jury trial by an accused must depend upon the unique circumstances of each case. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). A waiver is the intentional relinquishment of a known right. *McCoy v. State*, 60 Ark. App. 306, 962 S.W.2d 822 (1998); *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992). For a waiver to exist, there must be a voluntary abandonment or surrender, by a defendant, of a right

known by him to exist, with the intent that such right shall be surrendered. *McCoy, supra*. The waiver of the right to trial by jury must be knowingly, intelligently, and voluntarily made, and such must be demonstrated on the record or by the evidence. *Id.* The presumption of a waiver to a jury trial from a silent record is impermissible. *Burrell v. State*, 90 Ark. App. 114, 204 S.W.3d 80 (2005). The defendant has no duty to ensure that his trial is conducted in accordance with the Arkansas Constitution or to demand a trial by jury. *Davis v. State*, 81 Ark. App. 17, 97 S.W.3d 921 (2003). Instead, it is the trial court's duty to ensure that, if there is to be a waiver, the defendant waives his right to trial by jury in accordance with the Arkansas Constitution and the Rules of Criminal Procedure. *Maxwell, supra; McCoy, supra*.

The evidence in this case supports appellant's argument that he did not effectively waive his right to a jury trial. There is no record that appellant knowingly, intelligently, and voluntarily waived his right to a jury. The record only shows that appellant wished to have the case disposed of immediately. We cannot presume a waiver to a jury trial from a silent record. *See Burrell, supra*. Therefore, we hold that appellant was deprived of his constitutional right to a trial by jury, and we reverse and remand for a new trial.

Reversed and remanded.

GLOVER and HENRY, JJ., agree.